IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 21, 2007

JOHN B. GREEN, JR. v. BILLY H. SMITH, JR.

Appeal from the Circuit Court for Bedford County
No. 10210 F. Lee Russell, Judge

No. M2006-01729-COA-R3-CV - Filed April 30, 2008

The issues on appeal pertain to the exclusion of evidence concerning the condition of tires on a vehicle involved in a one-car accident. An injured passenger filed this action against the driver alleging that he sustained injuries as a result of the defendant's negligent operation of the vehicle. At trial, the plaintiff attempted to introduce evidence that the tires on the defendant's vehicle were so worn that the defendant's failure to conduct proper maintenance, replacing the tires, was a proximate cause of the accident. The trial court excluded the evidence on two grounds. One, evidence concerning the maintenance of the vehicle was outside of the pleadings. Two, the causal connection between the condition of the tires and the wreck required testimony of an expert. At the conclusion of the trial, the jury returned a verdict for the defendant. Finding no reversible error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and ANDY D. BENNETT, J., joined.

Ted W. Daniel, Murfreesboro, Tennessee, for the appellant, John B. Green, Jr.

S. Todd Bobo, Shelbyville, Tennessee, for the appellee, Billy H. Smith, Jr.

J. Russell Parkes and John Jay Clark, Columbia, Tennessee, for the appellee, Nationwide Mutual Insurance Company.

OPINION

On May 2, 2004, John Green was injured during a motor vehicle accident while riding as a passenger in a truck driven by his friend, Billy Smith. The two friends often "hung out" with one another on the weekends, and the weekend of the accident was no different. Green and Smith met after work in Shelbyville on Saturday, May 1, 2004, to socialize for the evening. The rendezvous began at Smith's "shop" or vehicle maintenance garage where Green and Smith often spent time together on weekends.

At some point later in the evening, Etta Marie Farris, a friend of Green and Smith, joined the group, and all three decided to travel to "Stampede's" dance club in nearby Murfreesboro. As was customary when Green and Smith got together, Smith drove his one-ton Ford-350 four-wheel drive diesel truck, and Green rode as his passenger along with Ms. Farris. They arrived at Stampede's at approximately 9:30 p.m., where they socialized, consumed alcohol, and watched the dancing. Green, Smith and Farris left Stampede's at 3:00 a.m., on Sunday morning, May 2, 2004, as the club was closing down. After leaving Stampede's, they drove back to Shelbyville in Smith's truck. Along the way, they picked up another friend, Ms. Nelson, and the four of them drove back to Smith's shop and "hung out and talked."

Later in the morning, the four left the shop and traveled down East Lane Street to take Ms. Nelson back to her apartment in Shelbyville. East Lane Street is a straight two-lane road with a dividing line between the opposite lanes of traffic. Parallel with East Lane Street on the left hand side of the truck's direction of travel was a single set of railroad tracks. On the other side of the tracks was a similarly parallel road, known as Railroad Avenue.

As the group traveled down East Lane Street on the way to Ms. Nelson's apartment, it was raining and the road surface was saturated with water. According to Green, it was just "puddle after puddle" of water on the roadway. Suddenly, the truck hit a puddle of water sending it into a counterclockwise spin, and Smith lost control of the truck.[1] The right side of the truck spun around and hit the railroad tracks, which paralleled East Lane Street. The truck traversed the railroad tracks and came to rest on Railroad Avenue inverted on the passenger side, where Green was seated. The other passengers ended up on top of Green. As a result of the accident, he suffered injuries to his right arm.

Shortly after the accident, Green and his father went to Smith's shop to inspect the remains of Smith's truck. In addition to the broken windows and the general poor condition of the truck, Green and his father noticed that the tires were in "bad shape."[2] Three of the tires were "really slick" and there was "very little" tread on them. According to Green, the tires were "paper thin" and one could "kind of see the wire" exposed from the tires.

On November 1, 2004, John Green filed a complaint against Billy Smith, alleging that he sustained injuries due to Smith's negligent operation of the truck. Both Smith and an "unnamed defendant," Nationwide Insurance Company, filed answers denying negligence.

The case was tried by jury on May 8 and 9, 2006.[3] At the trial, Green introduced evidence that Smith had driven in excess of 80,000 miles on three of the tires on the truck he drove the night

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[1] Smith concedes that he was driving "a little fast."

[2] The fourth tire, which had been recently replaced, was in better shape.

[3] A few days prior to the trial, Smith filed a Motion to Amend his answer to include the affirmative defenses of comparative fault and assumption of risk. The trial court denied this motion after hearing an argument on the day of the trial.

of the wreck.[4] The evidence concerning the number of miles on the tires was introduced without objection from Smith; however, when Green attempted to introduce additional evidence that the three tires were bald and the steel belts were exposed, Smith objected. The trial court sustained the objection and excluded any additional evidence concerning the condition of the tires on two grounds. The trial court held that the condition of the tires related to the maintenance of the vehicle, not the operation, and the plaintiff had not pled negligent maintenance in the Complaint. Thus, the court found the evidence to be outside of the pleadings. Second, expert testimony would be needed to establish that the condition of the tires was a proximate cause of the wreck. After excluding evidence regarding the maintenance of the tires, the trial court directed a verdict in favor of Smith on the issue of the tires as it explained the following to the jury:

> Ladies and gentlemen, on the issue of whether or not the tire tread caused this accident or having the tires be old or not changed timely, I've ruled that in the absence of expert testimony on that that is not a theory that the plaintiff can rely upon. So, I've directed a verdict on that narrow issue.

The trial court, however, immediately explained the limited scope of its ruling by stating:

> But I want to make it plain that that would have no effect whatsoever on the issue of whether or not speed, for instance, maintaining control over the vehicle, driving at a certain speed with water on the road, I'm not – I'm certainly not ruling one way or the other on whether that is or is not negligence and that will be the subject of the discussion by the attorneys.
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> But on the narrow issue of the tread, tire tread, in the absence of expert evidence on that causing this accident, I've directed a verdict for the defendant on that.

The trial proceeded on the claims asserted in the Complaint, which were submitted to the jury at the conclusion of all the proof. Following deliberations, the jury found in favor of the defendant. The trial court entered an order to that effect on May 15, 2006.[5] This appeal followed.

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[4] The truck was purchased in 2001, at which time the tires had only 2,730 miles on them. At the time of the accident, 84,251 miles had been driven on three of the four tires.

[5] Green subsequently filed a motion for a new trial, and the court denied the motion.

ANALYSIS

Green contends on appeal that the trial court's evidentiary rulings constituted reversible error. He frames the issues as follows: (1) whether the circumstance of driving on bald, slick tires is one of the relevant circumstances that determines whether defendant operated his vehicle on a wet road in a reasonable manner; and (2) whether the circumstances of driving on bald, slick tires is within the common knowledge and experience of jurors, so that the court is in error for directing a verdict in the absence of expert testimony.

Whether to exclude or admit evidence rested within the sound discretion of the trial judge. *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 442 (Tenn. 1993) (holding that that when arriving at a determination to admit or exclude evidence, trial courts are generally "accorded a wide degree of latitude and will only be overturned on appeal where there is a showing of abuse of discretion"); *see* Tenn. R. Evid. 401; *see also Brandy Hills Estates, LLC v. Reeves*, 237 S.W.3d 307, 318 (Tenn. Ct. App. 2006). Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to the propriety of the decision made." *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. *Id.*

The trial court permitted the plaintiff to introduce into evidence the fact that three of the tires on Smith's vehicle had been driven more than 80,000 miles. With this fact in evidence, there is little doubt the jury was aware that the high mileage tires were worn and in poor condition. In addition to the fact that Smith was driving on high mileage tires, evidence was introduced to show the weather, road and traffic conditions, Smith's speed of travel, and the fact the accident occurred just before dawn. These facts provided the jurors with sufficient relevant information upon which to draw their own lay person inferences and conclusions as to the effect of the various factors, including the high mileage, worn tires. We can only speculate as to what may have resulted from the jury knowing more details concerning the worn condition of the tires, especially due to the fact the plaintiff did not make an offer of proof of the evidence he had hoped to introduce.

It is significant that the plaintiff failed to make an offer of proof after the court advised that further evidence concerning the condition of the tires would not be admitted. Tenn. R. Evid. 103(a) provides "[e]rror may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected," and "the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context . . . ." Tenn. R. Evid. 103(a)(2). The plaintiff's failure to make an offer of proof is fatal to the issues raised. As this court noted in *Dickey v. McCord*, 63 S.W.3d 714, 723 (Tenn. Ct. App. 2001):

> Counsel for the Dickeys at no time attempted to make an offer of proof to preserve Mr. McCord's testimony for the record.

> Generally in Tennessee, a trial court's ruling on the admissibility of evidence is within the sound discretion of the trial judge. Further, trial courts are accorded a wide degree of latitude in their determination of whether to admit or exclude evidence, even if such evidence would be relevant. A trial court's evidentiary ruling will only be overturned on appeal upon a showing of abuse of discretion. *See Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 442 (Tenn. 1992) (citations omitted).
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> According to Rule 103 of the Tennessee Rules of Evidence, a party cannot claim error upon a trial court's ruling excluding evidence unless "a substantial right of the party is affected, and . . . (2) ***Offer of proof***. In case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context." Tenn. R. Evid. 103. Additionally, where an appellant fails to make an offer of proof, this Court will not reverse a trial court's evidentiary ruling. *See Shepherd v. Perkins Builders*, 968 S.W.2d 832, 834 (Tenn. Ct. App. 1997).
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> Because we find that the Dickeys did not make an offer of proof and because we also find that the trial judge did not abuse his discretion in limiting the cross-examination of Mr. McCord as it related to Dr. Van Dorn, we affirm the trial court's evidentiary ruling to exclude such testimony by Mr. McCord.

Dickey, 63 S.W.3d at 723.

Whether or not the trial court correctly ruled that lay witnesses could not testify as to the causal relationship between balding tires and hydroplaning is likewise moot. This too is due to the fact the plaintiff failed to make an offer of proof of the opinions of lay witnesses as to the causation issue. The record does reveal that the plaintiff had not retained an expert witness to testify concerning the condition of the tires or the causal relationship between the worn tires and the accident. Thus, other than introducing the lay testimony or photographs of the condition of the tires, the only other evidence available to the plaintiff would have been the "opinion" testimony of lay witnesses as to the combined effect of high mileage, worn tires in relation to the existing road conditions and the amount of water on the road, and the cause of the accident. The plaintiff and his lay witnesses should have been permitted to testify as to "the facts"; however, they would not have been permitted to opine as to such complex matters. This is because a non-expert witness must ordinarily "confine his testimony to a narration of facts based on first-hand knowledge and avoid stating a mere personal opinion." *Bandeian v. Wagner*, 970 S.W.2d 460, 461 (Tenn. Ct. App. 1997).

The plaintiff and his witnesses would not be competent to state why or how, in their opinion, the worn tires may have contributed to the accident. *See Kim v. Boucher* 55 S.W.3d 551, 555-56 (Tenn. Ct. App. 2001) (quoting *State v. Boggs*, 932 S.W.2d 467, 474 (Tenn. Crim. App. 1996) (holding that the admissibility of a lay witness's testimony "rests on whether the facts in issue are within the range of knowledge or understating of ordinary laymen")). A lay witness's opinion testimony is limited to opinions or inferences which are rationally based on the perception of the witness, and helpful to a clear understanding of the witness's testimony or the determination of a fact

in issue. Tenn. R. Evid. 701(a). Facts and opinions that are outside of the knowledge or understanding of ordinary laymen require the testimony of an expert witness. *Boggs*, 932 S.W.2d at 474 (citing J. Houston Gordon, *The Admissibility of Lay and Expert Opinions*, 57 Tenn. L. R. 103 (1989); *Securities Inv. Co. v. White*, 19 Tenn. App. 540, 91 S.W.2d 581, 587 (1935)).

Assuming, *arguendo*, that the trial court erred by excluding additional evidence concerning the "condition of the tires," the plaintiff had the additional burden to establish that the exclusion of the evidence constituted reversible error. To establish that the exclusion of the evidence constituted reversible error, the plaintiff had to establish that the error involved a substantial right which "more probably than not affected the judgment or would result in prejudice to the judicial process." Tenn. R. App. P. 36(b); *see Blackburn v. Murphy*, 737 S.W.2d 529, 533 (Tenn. 1987); *see also* Tenn. R. Evid. 103. An erroneous exclusion of evidence does not require reversal. For such an error to require reversal, it must be established that the excluded evidence would have affected the outcome of the trial had it been admitted. *Pankow v. Mitchell*, 737 S.W.2d 293, 298 (Tenn. Ct. App. 1987). The plaintiff has not established that the excluded evidence, the specifics of which remain unknown due to the fact an offer of proof was not made, would have affected the outcome of the trial had it been admitted. Therefore, assuming, *arguendo*, the trial court erred by excluding evidence concerning the condition of the tires, the error, if any, was not reversible error.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against John B. Green, Jr.

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FRANK G. CLEMENT, JR., JUDGE